

117 A.D.3d 544  
Supreme Court, Appellate Division, First  
Department, New York.

Frederick B. **WHITTEMORE**,  
Plaintiff–Respondent,

v.

Edwin H. **YEO**, III, Defendant–Appellant,  
**Endurance Capital Management Company, L.P.**, et  
al., Defendants.

May 15, 2014.

### Synopsis

**Background:** Defendant appealed from default judgment entered by Supreme Court, New York County, [Ira Gammerman, J.H.O.](#), 2013 WL 3363710, in action alleging fraudulent inducement.

**Holdings:** The Supreme Court, Appellate Division, held that:

[1] plaintiff established a prima facie claim of fraudulent inducement in support of default judgment;

[2] plaintiff established a sum certain on damages owed; and

[3] trial court properly awarded prejudgment interest.

Affirmed.

West Headnotes (5)

[1]

### Judgment

🔑Weight and sufficiency

Plaintiff established a prima facie claim of fraudulent inducement in support of default judgment, even though his complaint was not verified by him, where a review of the record showed that the affidavit he submitted on his motion for a default judgment provided first hand confirmation of the facts alleged.

[Cases that cite this headnote](#)

[2]

### Partnership

🔑Relation Among Partners

Even if plaintiff was a sophisticated investor, he was not precluded from alleging he reasonably relied on defendants' misrepresentations, as required to establish a prima facie claim of fraudulent inducement, in light of defendants' alleged failure to disclose certain diversions and to provide requested information regarding the allocation of plaintiff's investment in limited partnership.

[Cases that cite this headnote](#)

[3]

### Judgment

🔑Matters admitted

### Judgment

🔑Right to notice of and participation in subsequent proceedings

To the extent defendant contended that the evidence presented during inquest showed no misrepresentation made by him, by defaulting on claim of fraudulent inducement, he was deemed to have admitted all traversable allegations in the complaint and would not be allowed to introduce evidence tending to defeat plaintiff's cause of action during inquest.

[Cases that cite this headnote](#)

[4]

### Fraud

🔑Amount awarded

Plaintiff established a sum certain on damages owed on default judgment in action alleging fraudulent inducement by showing "out-of-pocket" losses in the amount awarded as a result of defendant's conduct; as plaintiff had

no knowledge of defendant's diversion of funds, he could not have mitigated damages.

[Cases that cite this headnote](#)

[5]

**Interest**

 [Particular cases and issues](#)

Trial court properly awarded prejudgment interest on default judgment in action alleging fraudulent inducement, as defendant had the advantage of using the money that plaintiff was fraudulently induced to contribute, and plaintiff was deprived of his use thereof. [McKinney's CPLR 5001\(a\)](#).

[2 Cases that cite this headnote](#)

**Attorneys and Law Firms**

**\*\*70** Kasowitz, Benson, Torres & Friedman LLP, New York ([Olga L. Fuentes-Skinner](#) of counsel), for appellant.

Bushell, Sovak, Ozer & Gulmi, LLP, New York ([Christopher J. Sovak](#) of counsel), for respondent.

[MAZZARELLI, J.P.](#), [ANDRIAS, DeGRASSE, MANZANET-DANIELS, FEINMAN, JJ.](#)

**Opinion**

**\*545** Judgment, Supreme Court, New York County (Ira Gammerman, J.H.O.), entered April 4, 2013, awarding plaintiff the total sum of \$11,900,345.18 as against defendant Edwin H. Yeo, III (defendant) on his fraudulent inducement cause of action, unanimously affirmed, with costs. Appeal from order, same court and Justice, entered December 20, 2012, unanimously dismissed, without costs, as subsumed in the appeal from the judgment.

[1] [2] [3] Plaintiff established a prima facie fraud claim in support of the default judgment. Although his complaint was not verified by him, a review of the record shows that the affidavit he submitted on his motion for a default judgment provided "first hand confirmation" of the facts alleged ([Joosten v. Gale](#), 129 A.D.2d 531, 535, 514 N.Y.S.2d 729 [1st Dept.1987]; see [Feffer v. Malpeso](#), 210

A.D.2d 60, 61, 619 N.Y.S.2d 46 [1st Dept.1994]; [Mullins v. DiLorenzo](#), 199 A.D.2d 218, 219–220, 606 N.Y.S.2d 161 [1st Dept.1993] ), which sufficiently states a claim for fraudulent inducement (see [Lama Holding Co. v. Smith Barney](#), 88 N.Y.2d 413, 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370 [1996] ). Defendant's contention that plaintiff could not claim justifiable reliance as a sophisticated investor who could have conducted due diligence is unavailing. As this Court has previously noted in this matter, plaintiff "was not precluded from reasonably relying on defendants' misrepresentations in light of the alleged failure to disclose certain diversions and defendants' failure to provide requested information regarding the allocation of plaintiff's investment in the limited partnership" (99 A.D.3d 496, 497, 952 N.Y.S.2d 136 [1st Dept.2012] ). To the extent defendant contends that the evidence presented during inquest showed **\*\*71** no misrepresentation made by him, by defaulting, he is deemed to have admitted all traversable allegations in the complaint and "will not be allowed to introduce evidence tending to defeat the plaintiff's cause of action" during inquest ([Rokina Opt. Co. v. Camera King](#), 63 N.Y.2d 728, 730, 480 N.Y.S.2d 197, 469 N.E.2d 518 [1984]; [Conteh v. Hand](#), 234 A.D.2d 96, 650 N.Y.S.2d 723 [1st Dept.1996] ).

[4] [5] Plaintiff also established a sum certain on damages owed by showing "out-of-pocket" losses in the amount awarded as a result of defendant's conduct (see [Lama Holding Co.](#), 88 N.Y.2d at 421, 646 N.Y.S.2d 76, 668 N.E.2d 1370). Defendant's contention that some of plaintiff's capital contributions had in fact been used for legitimate business purposes overlooks that fact that plaintiff made all his contributions in reliance on defendant's misrepresentations and that any use of the funds was a part of the overall fraud scheme. As plaintiff had no knowledge of defendant's diversion of funds, he could not have mitigated damages (see [LaSalle Bank N.A. v. Nomura Asset Capital Corp.](#), 47 A.D.3d 103, 108–109, 846 N.Y.S.2d 95 [1st Dept.2007] ). The court properly awarded prejudgment interest ( **\*546** CPLR 5001[a] ), as defendant had the advantage of using the money that plaintiff was fraudulently induced to contribute ([Manufacturer's & Traders Trust Co. v. Reliance Ins. Co.](#), 8 N.Y.3d 583, 589, 838 N.Y.S.2d 806, 870 N.E.2d 124 [2007] ) and plaintiff was deprived of his use thereof ([J. D'Addario & Co., Inc. v. Embassy Indus., Inc.](#), 20 N.Y.3d 113, 117–118, 957 N.Y.S.2d 275, 980 N.E.2d 940 [2012] ).

**All Citations**

117 A.D.3d 544, 986 N.Y.S.2d 69, 2014 N.Y. Slip Op.

**Whittemore v. Yeo, 117 A.D.3d 544 (2014)**

986 N.Y.S.2d 69, 2014 N.Y. Slip Op. 03597

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